

<b>Ramos v City of New York</b>
2015 NY Slip Op 30378(U)
February 6, 2015
Supreme Court, Bronx County
Docket Number: 308890/2011
Judge: Betty Owen Stinson
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: IAS PART 8

-----X  
GERALD RAMOS,

Plaintiff,

INDEX № 308890/2011

-against-

DECISION/ORDER

THE CITY OF NEW YORK,

Defendant.

-----X

HON. BETTY OWEN STINSON:

This motion by defendant City of New York (“City”) for summary judgment dismissing the Complaint is granted.

On March 8, 2011, plaintiff Gerald Ramos was exiting a park in Bronx County through a metal gate, when he made a right turn at the sidewalk abutting the park along Nelson Avenue, stepped into a tree well, and tripped over a raised paver or cobblestone in the tree well, injuring his right knee. Plaintiff sued the defendant City, alleging the City was negligent in the planting of the tree, in the construction of the tree well and the pavers surrounding the tree, and in the maintenance of the tree well, since “said paver was caused to be raised by the root system of the tree” (Notice of Claim, #3 “manner in which the claim arose”, filed April 28, 2011) and such defective condition was allowed to exist “for an unreasonable period of time” (Bill of Particulars, Par. 19-20, November 7, 2011).

After plaintiff filed his Note of Issue in November 2013, certifying that discovery was complete, the City made this motion for summary judgment arguing that the complaint should be dismissed because there is no evidence of prior written notice to the City of the alleged defect as

required by the New York City Administrative Code (“Administrative Code”) § 7-201(c)(1) and plaintiff has presented no evidence that one of the two recognized exceptions to the Administrative Code section are applicable here; to wit: either that the City caused and created the defective condition, or that it made a special use of the tree well.

Summary judgment is appropriate when there is no genuine issue of fact to be resolved at trial and the record submitted warrants the court as a matter of law in directing judgment (*Andre v Pomeroy*, 35 NY2d 361 [1974]). A party opposing a motion for summary judgment must come forward with admissible proof that would demonstrate the necessity of a trial as to an issue of fact (*Friends of Animals v Associated Fur Manufacturers*, 46 NY2d 1065 [1979]).

A party moving for summary judgment has the initial burden of establishing *prima facie* that it is entitled to judgment as a matter of law by submitting sufficient admissible evidence to demonstrate that there are no triable issues of fact (*Bush v St. Clare’s Hospital*, 82 NY2d 738 [1993]). Only if that burden is met does the burden shift to the non-moving party to present evidence of an issue of fact for trial (*Winegard v NYU Medical Center*, 64 NY2d 851 [1985]). If the moving party fails to meet its burden, the motion must be denied regardless of the sufficiency of the non-moving party’s opposition (*id.*).

Tree wells are not part of the sidewalk for purposes of Administrative Code § 7-210 which requires owners of real property to maintain abutting sidewalks in reasonably safe condition (*Vucetovic v Epsom Downs, Inc.*, 45 AD3d 28 [1<sup>st</sup> Dept 2007], *aff’d* 10 NY3d 517 [2008][abutting landowner not liable for plaintiff’s injury due to tripping on cobblestone in tree well]). Title 19, Chapter 1 of the Administrative Code, “Streets and Sidewalks”, defines sidewalks as “that portion of a street . . . “intended for the use of pedestrians” (§ 19-101[d]). Neither trees nor tree wells are

intended for the use of pedestrians and are not part of the sidewalk for the purposes of § 7-210 (*Vucetovic*, 45 AD3d 28).

Tree wells are, rather, “encumbrances” or “attachments” to a sidewalk as set forth in the broader language of Administrative Code § 7-201 which requires a plaintiff to show prior written notice to the City before the City can be held liable for sidewalk defects, which include any encumbrances or attachments to the sidewalk (*Tucker v City of New York*, 84 AD3d 640 [1<sup>st</sup> Dept 2011][City not liable without prior written notice of defect for plaintiff’s trip and fall injury in tree well]). Administrative Code § 7-201(c) ensures that the City receives written notice of defects in the public way so that it may repair a problem before it incurs liability (*Tucker*, 84 AD3d 640). The “public way” for the purpose of *this* section encompasses both sidewalks and “any encumbrances thereon or attachments thereto” (*id.*).

When the City establishes a lack of prior written notice of a defect in a sidewalk, including any attachments or encumbrances on the sidewalk, the burden shifts to plaintiff to demonstrate the applicability of one of two recognized exceptions to the Administrative Code § 7-201 (*Yarborough v City of New York*, 10 NY3d 726 [2008]). A municipality may be alleged to have caused or created the defect through an affirmative act of negligence, but that exception “is limited to work by the City that immediately results in the existence of a dangerous condition” (*id.*, citing *Oboler v City of New York*, 8 NY3d [2008], quoting *Bielicki v City of New York*, 14 AD3d 301 [1<sup>st</sup> Dept 2005]; see also *Zimbardi v City of New York*, 94 AD3d 454 [1<sup>st</sup> Dept 2012][plaintiff’s motion for summary judgment after trip and fall in tree well denied for lack of prior written notice and because plaintiff presented no evidence of an affirmative act by the City “immediately” resulting in dangerous condition]; *Zizzo v City of New York*, 176 AD2d 722 [2<sup>nd</sup>

Dept 1991][defendant granted summary judgment when, viewed in light most favorable to plaintiff, plaintiff failed to show that condition of sidewalk, raised by tree roots, was created by abutting landowner as opposed to normal growth of tree with passage of time]).

The second exception, special use, “is reserved for situations where a landowner whose property abuts a public street or sidewalk derives a special benefit from that property unrelated to the public use” (*Poirier v City of Schenectady*, 85 NY2d 310 [1995][abandoned metal sign post anchor in sidewalk did not create special use of the sidewalk for municipality since traffic signs do not confer special benefit to municipality, motorists or pedestrians unrelated to public use]); (*Minott v City of New York*, 230 AD2d 719 [2<sup>nd</sup> Dept 1966][special use is “a use different from the normal intended use of the public way”]).

If neither exception to the requirement for prior written notice is applicable, constructive notice will be insufficient since it is, by definition, not written notice. Actual notice other than written notice is similarly insufficient unless given in writing. Theories of liability not alleged in the notice of claim or complaint may not be raised in opposition to a motion for summary judgment (*Rollins v New York City Board of Education*, 68 AD3d 540 [1<sup>st</sup> Dept 2009]).

In support of its motion, defendant offered copies of the pleadings, the Notice of Claim, the Bill of Particulars, plaintiff’s 50-h testimony, black and white photographs of the tree well and surrounding area, the deposition testimony of Bill Sackel and an affidavit by Carla Lake. Plaintiff’s Notice of Claim alleged negligence in the planting of the tree, the construction and maintenance of the tree well and pavers surrounding the tree, and alleged that “said paver was caused to be raised by the root system of the tree . . . which was improperly planted, . . . and improperly maintained, inspected, and repaired by the City of New York”. Plaintiff’s Bill of

Particulars supplemented the Notice of Claim by alleging that defendant City caused and created the defective condition in the tree well and had both actual and constructive notice of the “inappropriately placed paver”.

The black and white photographs of the area around the tree well show sidewalk interrupted only by one tree well located to the right of the gate from the perspective of one exiting the gate. The tree well in the photograph does not block the gate or force a pedestrian to walk in the area between the fence and the tree. The path to the left is not shown in the photographs. The path going straight ahead out of the gate appears clear with nothing apparent to block a pedestrian from turning right after passing the tree and proceeding right on the sidewalk between the tree and the street. The photograph pictures a garbage can against the fence near the location of the tree well.

Plaintiff testified at his 50-h hearing that he walked past the subject tree before his accident “plenty of times” (50-h hearing, August 9, 2011 at 22, 31, 51). He testified that he complained numerous times to a park employee, to the community board and to a councilman about placement of the tree, “right in the center of the exit of the park” (*id.* at 44, 45-46, 50). None of those complaints were in writing (*id.* at 46, 49). At the time of the subject accident, plaintiff turned to his right when coming out of the park gate (*id.* at 52, 57-58). There were garbage cans along the fence (*id.* at 56). Plaintiff kicked the raised cobblestone in the tree well with his left foot and stumbled, hearing two “pops” in his right knee before falling down (*id.* at 25, 63). Plaintiff’s attorney instructed plaintiff not to answer whether there were any obstructions in the way keeping him from going straight or to the left when he came out of the park gate (*id.* at 59).

A Parks Supervisor, Bill Sackel, testified that when complaints are received about tree wells, the Parks Department does inspections (deposition, November 25, 2013 at 1, 5). He is familiar with the park in question (*id.* at 7). The Parks Department is responsible for the maintenance of the tree well (*id.* at 9-11). The tree well in question is identified by its location on Nelson Avenue between 165<sup>th</sup> and 166<sup>th</sup> streets in front of the entrance to the park (*id.* at 12, 22). Mr. Sackel testified that the raised paver shown in the photographs would not be considered a hazard for pedestrians because it is neither big enough nor high enough and people do not normally walk in tree pits (*id.* at 14). The raised edge of the paver is located at the dirt edge of the pavers “where most people won’t walk”(*id.* at 15).

Carla Lake stated in an affidavit dated February 20, 2014 that she is a Parks Associate Staff Analyst and records searcher. She performed a search for all documents regarding complaints, correspondence, pruning records, tree removal records, maintenance and repair records for Nelson Avenue between 165<sup>th</sup> and 166<sup>th</sup> streets for two years prior to and including March 8, 2011 and found no records for that location.

In opposition to the motion, plaintiff offered an affidavit by the plaintiff, the photographs of the subject tree well in color, portions of what appear to be Administrative Code sections about sidewalks, portions of the Administrative Code covering the duties and obligations of property owners with respect to sidewalks, the City’s Tree Planting Standards, and the affidavit of Nicholas Bellizzi. The City’s Tree Planting Standards do not allow trees to be planted in front of doorways.

Plaintiff stated in his affidavit that, at the time of his trip and fall, several garbage cans were lined up against the fence on the left side of the gate opposite to where a garbage can is shown in the photographs, which is pictured on the right side of the gate (Affidavit of Gerald

Ramos, April 10, 2014). Plaintiff stated that the garbage cans on the left side of the gate would have blocked his path had he turned in that direction. Therefore, he “had to walk toward the right of the tree”. He did not address the option of walking straight ahead and turning right after passing the tree. Prior to the subject incident, plaintiff stated that he complained to the Parks Department, patrolling officers and his councilman Wendell Foster about the placement of the tree “in the middle of a walkway” and “uneven base support of the tree”. The City built the park. The City planted the tree and City workers placed the garbage cans in an obstructive way. Therefore, according to plaintiff, “[e]verything that was wrong with the area” was caused and created by the City.

Nicholas Bellizzi, a licensed professional engineer, stated that he reviewed color photographs of the accident location; black and white photographs of same; the New York City Department of Transportation (“NYCDOT”) Highway Rules § 2-09(e) for conditions that constitute a “substantial” sidewalk defect; the Administrative Code § 19-152 for proper construction, installation and repair of sidewalk flags; the pleadings; prior orders in the case; plaintiff’s 50-h hearing transcript and Bill Sackel’s deposition transcript.

The NYCDOT rules quoted by Mr. Bellizzi do not mention tree wells. According to Mr. Bellizzi, the subject defect, a raised paver, was located close to the entrance of a park in a tree pit, on the inner ring of pavers closest to the tree. The paver was a “substantial defect” according to NYCDOT rules and an “unsafe walkway segment” that was dangerous and hazardous as it was not designed, maintained or repaired properly, among other things. Any routine maintenance would have revealed its unsafe condition.

The portions of the Administrative Code § 19-152 quoted by Mr. Bellizzi also do not

mention tree wells. Nevertheless, he concluded that the estimated 2-inch height differential was not trivial, but also not open or obvious due to the small size, similar colors, tone and shapes of the pavers. The 2-inch height differential was in violation of NYCDOT Highway Rules § 2-09 and Administrative Code § 19-152 in that it met the definition of a sidewalk defect because it was greater than ½ inch. The subject “defective sidewalk segment’s location” was not installed initially in conformance with the Parks Department’s own Tree Planting Standards because the “loose brick pavers” were placed in the soil without the use of cement or mortar. Mr. Bellizzi states that they were not joined by cement in any way. There was no tree pit guard or fence, which should have been installed to keep pedestrians from stepping into the tree pit.

The Tree Planting Standards at Section 7(A) direct that the inner ring of pavers in a tree pit must have cement mortar between the paver joints. Tree pit guards are not required (Section 7[B]). The color photographs attached to plaintiff’s affidavit clearly show mortar between the subject tree well pavers and a large tree root going directly under the raised paver.

In reply to the plaintiff’s opposition, defendant offered a Google Map photograph of the metal gate, tree well, tree and sidewalk from the perspective of the street, confirming a larger sidewalk area than seen in the previous photographs coming straight out of the metal gate of the park and showing ample unencumbered space to walk no matter the number of garbage cans along the fence on either side of the gate. Based on the size of the surrounding objects, including the gate, the tree well and a car parked on the street, the sidewalk flags appear to be 4 feet x 6 feet and there are five of them coming from the gate to the street and two from the tree well to the street.

The City has made a *prima facie* case of its entitlement to summary judgment which the plaintiff has not refuted with admissible evidence. The City’s record searcher, Carla Lake, offered

evidence the City had no record of prior complaints of any kind regarding that tree or tree well. Plaintiff admitted he did not give the City prior written notice of the subject raised paver on which he tripped, and the City cannot be held liable for the condition of that paver in a tree well without written notice (*see* Administrative Code § 7-201[c]; *Tucker*, 84 AD3d 640). Actual and constructive notice cannot form the basis for liability given the statutory requirement of written notice.

Plaintiff did not raise an issue of fact as to whether the condition of the subject paver was caused and created by the City or whether the City, as the landowner of the park abutting the sidewalk, derived a special benefit from the tree, the tree well or the paver, unrelated to the public use. A public park, by definition, exists for the public benefit and use, as do the sidewalk and tree well with tree. The defendant City has no purpose other than to provide benefit to the public.

Plaintiff's own Notice of Claim alleges that the subject paver was caused to be raised by one of the tree's roots, a condition which plaintiff failed to show was caused or created by the City as opposed to the normal growth of the tree with the passage of time (*see Zizzo*, 176 AD2d 722 [no City liability for sidewalk flag raised by tree root]). In other words, plaintiff did not show that the paver's condition arose "immediately" due to negligent planting or maintenance of the tree (*see Yarborough*, 10 NY3d 726 [City liability limited to work immediately causing defective condition]). It would be indulging in speculation to find otherwise.

The photographs attached to plaintiff's Notice of Claim belie his claim that the tree was improperly planted "in the middle of a walkway" from the park. Even with a garbage can along the right side of the fence, as pictured in the photographs, there is sufficient space to make a sharp turn from the gate and continue walking between the tree well and the fence, although that appears

to be the most narrow path possible after exiting from the gate. If there were more garbage cans placed along the fence in that location than appear in the photographs, a person walking between the fence and the tree well could still avoid stepping on a corner of the square-shaped tree well and would also have the option of walking straight ahead out of the gate through a much wider space and then turning right to walk on the sidewalk between the tree and the street. Plaintiff's attorney did not allow him to address that option at his 50-h hearing.

In plaintiff's affidavit in opposition, he clarified his 50-h testimony to say garbage cans were lined up along the fence to the left of the park gate, not to the right. Thus, presumably, he was unable to walk to the left on that occasion. Not only does that clarification avoid addressing exiting straight ahead out of the park, but means his path to the right was even wider as there were no garbage cans on that side.

Plaintiff's expert's affidavit is insufficient to raise an issue of fact for trial. The color photographs offered by plaintiff show clearly that the pavers have mortar in the joints between them, despite Mr. Bellizzi's claim to the contrary, and he reportedly had those photographs to review. In addition, despite Mr. Bellizzi's opinion that the subject tree well should have had a tree guard, the Tree Planting Standards affirmatively state that tree guards are not required. His opinion that the tree well's design was defective is not further explained and that theory of liability is offered in opposition to this motion for the first time. It was not contained in either the Notice of Claim or the Bill of Particulars and cannot be the basis for denial of summary judgment (see *Rollins*, 68 AD3d 540 [theories of liability not in notice of claim or complaint may not be raised in opposition to summary judgment]).

Even if the theory of defective design had been adequately noticed and pled, the Google

Map photograph of the subject gate, sidewalk and tree well from the perspective of the street underscore the fact that no matter how many garbage cans were lined up along the fence on either side of the gate, plaintiff was not forced to go immediately to the right after exiting the park gate and had more than ample space to go in the direction desired without stepping in the tree well.

This constitutes the decision and order of the court.

Dated: February 6, 2015  
Bronx, New York

  
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**BETTY OWEN STINSON, J. S.C.**